GEK SING KALIAPPAN

v.

PP

HIGH COURT MALAYA, KANGAR
VINCENT NG J
[CRIMINAL APPEAL NO: 41-5-99]
22 SEPTEMBER 1999

CRIMINAL PROCEDURE: *Sentence - Judicial notice - Whether may be taken - Matters of common or general knowledge - What constitute - Prevalence of similar offences - Ineffective fines - Deterrent sentence*

CRIMINAL PROCEDURE: *Sentence - First offender - Imprisonment - Whether suitable - Whether sentence of imprisonment can be passed on first-time offender - Public interest - Patent and latent circumstances that may operate for or against offender*

CRIMINAL PROCEDURE: *Sentence - Revision - Powers of High Court and judge on revision - Enhancement of sentence - Principles governing - Criminal Procedure Code, ss. 323 & 325 - Courts of Judicature Act 1964, s. 31*

CRIMINAL PROCEDURE: *Sentence - Deterrent sentence - Whether justifies sentence of greater length than that which facts of offence warrant - Principles of sentencing*

CRIMINAL PROCEDURE: *Sentence - Concurrent or consecutive - Totality principle - Duty of sentencer to consider totality of cumulative sentences - Reasons for sentencing - Whether need be given - 'Crushing sentence' - Whether to be discouraged*

The appellant pleaded guilty to two charges under s. 68 of the Protection of Wild Life Act 1972 and to a third charge under s. 92(1)(c) thereof, and was convicted and sentenced to seven days' imprisonment and RM3,000 fine on each of the first two charges and seven days' imprisonment and RM5,000 fine on the third charge. This was his appeal against the sentences imposed.

Held:

[1a] In the exercise of his discretion in sentencing, the judge may take judicial notice of the prevalence of similar offences and other related factors. Judicial notice may be taken of matters of common or general knowledge. A fact is said to be generally recognised or known when its existence or operation is accepted by the public without qualification or contention. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.

[1b] The magistrate had, quite rightly and wholly acting within his powers, found it necessary to take judicial notice of the facts and circumstances of the case and was driven to impose short terms of imprisonment besides the maximum fines. He had rightly taken judicial notice of the prevalence of similar offences in the state and the ineffectiveness of fines as a deterrent.

[2] A first offender of good character – where his first offence is not of great intrinsic gravity – ought not to be sent to prison. However, there is no law which precludes a magistrate, in a given peculiar set of circumstances, from imposing a term of imprisonment even for first-time offenders. Thus, in exceptional cases, the court may factor into its deliberations on the question of public interest, not only patent but also latent circumstances that may operate for or against the accused.

[3] The High Court in hearing an appeal may, and has complete jurisdiction to, exercise its powers of revision and make such orders as it deems fit under ss. 323 and 325 of the Criminal Procedure Code and s. 31 of the Courts of Judicature Act 1964 – provided no orders to the prejudice of the accused shall be made unless he has had an opportunity of being heard.

Obiter:

[1] The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of a greater length than that which the facts of the offence warrant.

[2] Where consecutive sentences are passed against an offender, a duty is imposed on the sentencer to take into account the totality of the cumulative sentences (the totality principle) to determine whether it is justified by the criminal behaviour of the offender, the degree of his culpability and the aggravating features of the crime in the cases as a

whole. A further duty is also reposed in the sentencer to show that he has acted judicially by giving reasons for so sentencing. A 'crushing sentence' is discouraged as our penal system does not subscribe to the 'parole' system such as practised in the United States of America.

[Appeal dismissed; sentence of imprisonment increased to 14 days on each of the three charges and to be served concurrently.]

Case(s) referred to:

Abu Seman v. PP [1982] 2 MLJ 338 ***(refd)***
Chan Sit Hoong v. PP [1975] 1 MLJ 261 ***(refd)***
Chunbidya & Ors v. Emperor AIR [1935] PC 35 ***(refd)***
Goh Kheng Seong v. PP [1992] 4 CLJ 2133 ***(refd)***
Hari Ram Seghal v. PP [1981] 1 MLJ 165 ***(refd)***
Hashim Pawanchee & Anor v. PP [1988] 2 MLJ 66 ***(refd)***
Hj Johari Hj Abdul Karim v. PP [1989] 2 MLJ 276 ***(refd)***
Jaafar Abu & Anor v. PP [1988] 2 CLJ 595 ***(refd)***
Joginder Singh v. PP [1984] 2 MLJ 133 ***(refd)***
Lasoo & Anor v. PP [1965] (1) 31 MLJ 235 ***(refd)***
Lee Chow Meng v. PP [1976] 1 MLJ 287 ***(refd)***
Lee Yong Wu v. PP [1965] 28 MLJ 351 ***(refd)***
Leong Ka Kong v. PP [1976] 2 MLJ 21 ***(refd)***
Lim Yoon Fah v. PP [1971] 1 MLJ 37 ***(refd)***
Loh Hock Seng & Anor v. PP [1980] 2 MLJ 13 ***(refd)***
Marimuthu Balakrishnan v. PP [1974] 2 MLJ 145 ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405 ***(refd)***
Mohd Johan Mutalib v. PP [1978] 1 MLJ 213 ***(refd)***
PP v. Chan Chuan & Anor [1991] 2 MLJ 538 ***(refd)***
PP v. Chot Saik Kam [1991] 1 MLJ 193 ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Low Kok Wai [1988] 2 CLJ 105 ***(refd)***
PP v. Ng Chong Wan [1988] 2 CLJ 833 ***(refd)***
PP v. Oo Teng Swee & Ors [1981] 1 MLJ 247 ***(refd)***
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***
PP v. Saad Mat Takraw & Anor [1998] 3 CLJ 380 ***(refd)***
PP v. Teo Heng Chye [1990] 1 CLJ 194 ***(refd)***
PP v. Wong Kok Sein & Ors [1988] 1 CLJ 873 ***(refd)***
PP v. Yap Chong Fatt [1963] 29 MLJ 136 ***(refd)***
PP v. Yap Huat Heng [1986] 1 CLJ 81 ***(refd)***
PP v. Zulkifli Omar [1998] 1 CLJ 1079 ***(refd)***
R v. Ball 35 Cr App R 164 ***(refd)***
R v. Boyd [1980] 2 Cr App R(S) 234 ***(refd)***
R v. Cutbush [1867] LR 2 QB 329 ***(refd)***
R v. John Allstair Faulkner [1972] 56 Cr App R 594 ***(refd)***
R v. Ladd & Tristam [1975] Cr LR 50 ***(refd)***
R v. Mesde [1982] 4 Crim App R(S) 193 ***(refd)***

R v. Newton [1984] 4 Cr App R 388 ***(refd)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Taib Gemok v. PP [1984] 1 MLJ 313 ***(refd)***
Wong Kai Chuen Phillip v. PP [1991] 1 MLJ 321 ***(refd)***
Yong Pak Yong v. PP [1959] MLJ 176 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 31
Criminal Procedure Code, ss. 283, 323, 325
Protection of Wild Life Act 1972, ss. 68, 92(1)(c)

Other(s) referred to:
Principles of Sentencing, DA Thomas, 2nd edn, p 57
Sarkar on Evidence, 12th edn, p 575

For the appellant - S Devandran; M/s Devandran & Co
For the PP - Abdul Razak Musa DPP

Reported by Gan Peng Chiang

JUDGMENT

Vincent Ng J:

On 19 April 1999 the learned magistrate convicted the appellant after he pleaded guilty to the following three charges under the Protection of Wild Life Act 76/72 to wit:

(1) Bahawa kamu pada 12.4.99, jam lebih kurang 3.15 petang, di Setor Kastam Padang Besar, Padang Besar Utara dalam Negeri Perlis, didapati dengan menyalahi undang-undang memiliki 105 ekor 'binatang liar yang diperlindungi' iaitu 105 ekor Ular Asiatic Cobra (Naja-naja) yang masih hidup (sejenis binatang liar yang disenaraikan dalam Jadual Dua Butiran 422 dibawah Akta 76/72). Oleh hal yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 68, Akta Perlindungan Hidupan Liar (Pin) 1988, Akta Perlindungan Hidupan Liar Bilangan 76 Tahun 1972. (The first charge).

(2) Bahawa kamu pada tarikh, waktu dan di tempat yang sama, telah didapati dengan menyalahi undang-undang memiliki 2441 ekor 'binatang liar yang diperlindungi' iaitu 2441 ekor ular Oriental Rat Snake (Ptyas mucosus) yang masih hidup (sejenis binatang liar yang disenaraikan dalam Jadual Dua, butiran 433, dibawah Akta 76/72). Oleh hal yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 68, Akta Perlindungan Hidupan Liar (Pin) 1988, Akta Perlindungan Hidupan Liar Bilangan 76 Tahun 1972. (The second charge).

(3) Bahawa kamu pada tarikh, waktu dan di tempat yang sama, telah didapati dengan menyalahi undang-undang memiliki 2546 ekor 'binatang liar yang diperlindungi' iaitu 105 ekor Ular Asiatic cobra (Naja-naja) dan 2441 ekor Ular Oriental Rat Snake (ptyas mucosus) dalam kurungan yang tidak sesuai (dengan mengurung binatang berkenaan dalam karung guni net nylon dan raga plastik) (sejenis binatang liar yang disenaraikan dalam Jadual Dua, butiran 422 dan 433, di bawah Akta 76/72). Oleh hal yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 92(1)(c)(Pin) 1988, Akta Perlindungan Hidupan Liar Bilangan 76 Tahun 1972. (The third charge).

On the first charge the appellant was sentenced to seven days imprisonment and RM3,000 fine, and in default three months jail. He was similarly penalised on the second charge, and on the third charge the learned magistrate imposed seven days imprisonment and RM5,000 fine, and in default five months jail.

Some like it hot in the pot, but most hate it – in or out of the pot – since its alleged unfortunate watershed encounter with the biblical Adam and Eve. Be that as it may, like it or not, the snakes concerned in the current charges against the appellant are protected species not only in Malaysia but, also, under the Convention On The Trade of Endangered Species of Flora and Fauna of which Malaysia became a member since 19 October 1977.

Sentencing is guided by established principles and guidelines – in accordance with which, the courts generally exercise their discretion – which I would now propose to adumbrate in catalogue form for the benefit of judicial officers of the lower courts, who have scarce time to glean and pick the essential points from a long rambling dissertation on the topic. The principles and guidelines to be adopted, though not slavishly applied in every case, are to wit:

(1) Public interest is of paramount consideration, though, if the offender could, by the nature of the sentence, be induced to turn from criminal ways to honest living, such interest is indeed served. See *R v. Ball* 35 Cr App R, 164, *Lim Yoon Fah v. PP* [1971] 1 MLJ 37, *Chan Sit Hoong v. PP* [1975] 1 MLJ 261 and *Goh Kheng Seong v. PP* [1992] 4 CLJ 2133.

(2) A first offender of good character where his first offence is not of great intrinsic gravity ought not to be sent to prison – See *PP v. Yap Chong Fatt* [1963] 29 MLJ 136, *Taib bin Gemok v. PP* [1984] 1 MLJ 313 and *Zaidon Shariff v. PP* [1996] 4 CLJ 441.

(3) A previous conviction is to be taken into consideration in assessing sentence only if the previous offence was not too far apart in time and was of a similar nature as the one with which an accused is presently charged, and the court may call for evidence of information regarding the background, antecedent and character of the accused. See *PP v. Jafa bin Daud* [1981] 1 MLJ 315. The telling effect of a previous conviction on an offence committed a considerable time before, though of a similar nature to the current charge, ought to be viewed as having attenuated.

(4) A plea of guilt especially before the trial has commenced should be treated as a mitigating factor and, it is generally accepted that the extent of the reduction on account of a plea of guilty to a charge would be between one-quarter and one-third of what otherwise would have been the sentence. And, such credit or discount to be given in favour of the accused person is not on the maximum sentence imposed by law but rather on a sentence which would have been imposed if the accused had claimed trial and had been found guilty. See *Mohd. Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1988] 1 MLJ 167, *PP v. Ravindran & Ors* [1993] 1 MLJ 45, *R v. Boyd* [1980] 2 Cr App R(S) 234 and *R v. Mesde* [1982] 4 Crim App R (s) 193 Cr LR 613. See also *PP v. Low Kok Wai* [1988] 2 CLJ 105, *PP v. Oo Teng Swee & Ors* [1981] 1 MLJ 247 and *Sau Soo Kim v. PP* [1975] 2 MLJ 134 (where it was also held that a guilty plea is not appealable save under certain circumstances).

(5) There is a clear dichotomy between pre and post-conviction stages of a trial and the charge *per se* does not form the basis for the sentence. It is from the facts put forward by the prosecution, including facts which aggravate the offence, as admitted or contested by the accused, that form such basis for sentencing. And, should the version of facts admitted by the accused and the prosecution's version differ but differ not so markedly or significantly or so materially as to affect the substratum ingredients of the charge and negate the very plea of guilt, a "newton hearing" ought to be carried out in the interest of justice. See *Goh Kheng Seong v. PP* [1992] 4 CLJ 2133 and *R v. Newton* [1984] 4 Cr App R 388.

(6) The other basis to pay regard in determining what the proper level of sentence should be the mitigation plea which should not be brushed aside but examined and considered equally with the facts presented by the prosecution to strike a true balance in the scale of justice. See *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 270. The aggravating factors should be considered in conjunction with the mitigating factors including matters of mitigation special to the accused himself.

(7) In determining the length of custodial sentence: "the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence." Per Mohd Azmi SCJ in *Mohamed Abdullah Ang Swee Kang v. PP (supra)*, wherein the following dicta of James LJ in *R v. Ladd & Tristam* [1975] Cr LR 50, was cited with approval:

> We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of Criminality involved, and we had to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind though of course varying in their gravity. Clearly, a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified.

Also, I subscribe totally to the salutary advice appearing in the *obiter dictum* of Wan Yahya J in *Hari Ram Seghal v. PP* [1981] 1 MLJ 165, who had this to say: "The court must resist the temptation and decline any invitation into playing the romantic role of the avenger and must concentrate itself instead on procuring justice and upholding the rule of law through our recognised machinery of justice. The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in the machinery, which may have the possibility of injustice, must be resolved in their favour." Yet, I would agree that in appropriate cases "judges should not develop a phobia against inflicting the death penalty" *Loh Hock Seng & Anor v. PP* [1980] 2 MLJ 13.

(8) The sentencer is clothed with unencumbered discretion – safe by express law – in deciding the appropriate sentence to mete out, though such discretion ought to be exercised in accordance with certain established principles.

(9) In the exercise of such discretionary function in sentencing (as opposed to and distinct from a finding of guilt or innocence which is not a matter of discretion) the sentencer may take judicial notice of the prevalence of similar offences and other related factors. See *Lee Chow Meng v. PP* [1976] 1 MLJ 287, *Yong Pak Yong v. PP* [1959] MLJ 176, *PP v. Zulkifli Omar* [1998] 1 CLJ 1079 to be read with *PP v. Saad bin Mat Takraw & Anor* [1998] 3 CLJ 380. Judicial notice may be taken on matters of common or general knowledge. What matters constitute common and general knowledge may be gathered from *Sarkar on Evidence*, 12th edn, where the learned author, speaking of common knowledge, at p. 575, said – "The matter of which a court will take judicial notice must be a subject of common and general knowledge. In other words, judicial knowledge of facts is measured by general knowledge of the same facts. A fact is said to be generally recognised or known when its existence or operation is accepted by the public without qualification or contention. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof."

(10) The determination whether a concurrent or consecutive sentence ought to be imposed, in respect of several offences tried together is dependant on the particular facts of each case. See *Lee Chow Meng v. PP* [1976] 1 MLJ 287. And, where two or more clearly distinct and separate offences on different persons, had been committed, sentences of imprisonment should not be made to run concurrently. See *R v. Cutbush* [1867] LR 2 QB 329. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence or an offence closely related to the principal offence or arising out of the same transaction. See *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1985] 2 MLJ 414, *Abu Seman v. PP* [1982] 2 MLJ 338, *Hashim bin Pawanchee & Anor v. PP* [1988] 2 MLJ 66, *Haji Johari bin Haji Abdul Karim v. PP* [1989] 2 MLJ 276, *PP v. Wong Kok Sein & Ors* [1988] 1 CLJ 873; [1988] 2 MLJ 436, *Sau Soo Kim v. PP (supra)*, and *PP v. Ng Chong Wan* [1988] 2 CLJ 833; [1988] 3 MLJ 114.

(11) The Penal Code and the Criminal Procedure Code give no direct guidance as to consecutive and concurrent sentences and our lower courts are often confronted with this perplexing question. However, should an accused be convicted of two or more offences tried together, the Singapore courts have adopted the totality test enunciated in *R v. John Allstair Faulkner* [1972] 56 Cr App R 594, 1972 Crim. LR 577. See *Marimuthu Balakrishnan v. PP* [1974] 2 MLJ 145, *PP v. Teo Heng Chye* [1990] 1 CLJ 194; [1989] 3 MLJ 207, *PP v. Wong Kok Sien* [1988] 2

MLJ 436, *PP v. Chot Saik Kam* [1991] 1 MLJ 193 and *Wong Kai Chuen Phillip v. PP* [1991] 1 MLJ 321. It is an established principle of sentencing that where consecutive sentences are passed against an offender, a duty is imposed on the sentencer to take into account the totality of the cumulative sentences to determine whether it is justified by the criminal behaviour of the offender, the degree of his culpability and the aggravating features of the crime in the cases as a whole. As analysed by DA Thomas in *Principles of Sentencing* (2nd edn) at p. 57, the totality principle has two limbs:

> A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his record or prospects.

It is to be noted that this totality approach was readily accepted here in *Hashim bin Pawanchee & Anor v. PP (supra)* where Mohd. Dzaiddin J (as he then was), following *Marimuthu Balakrishnan v. PP (supra),* said: "On the other hand, on the basis of the principles discussed above, in my judgment, the decision of the learned magistrate to order the sentence to run consecutively is not wrong in principle having regard to the offences and the totallity of the sentences." But, in that case it was further held that since the six sentences (for misappropriation and forgery) ought to run consecutively, the 14 month's term of imprisonment for each offence was "manisfestly excessive and, unreasonable" and his lordship reduced the 14 months term to 12 months term for each of the six charges. See also *Sau Soo Kim v. PP (supra).*

After having exercised his discretion to order the sentences to run consecutively, a further duty is reposed in the sentencer to show that he had acted judicially by giving reasons for so acting. A 'crushing sentence' is discouraged for the obvious reason that our penal system does not subscribe to the parole system such as practised in the United States of America, where the imposition of aggregate sentences of 30 to 80 years are not uncommon phenomenon. Though, in this context it may not be of interest to add here that, the sentences of caning for two or more distinct offences do not merge but instead are aggregated. See *PP v. Chan Chuan & Anor* [1991] 2 MLJ 538.

(12) It is settled that the High Court in hearing an appeal may, and has complete jurisdiction to, proceed to exercise its powers of revision and make such orders as it deems fit under ss. 323 and 325 of the Criminal Procedure Code and s. 31 of the Courts of Judicature Act 1964 –

provided that no order to the prejudice of the accused shall be made unless he or his counsel has had an opportunity of being heard (see s. 325(ii) of CPC). See *Jaafar bin Abu & Anor v. PP* [1988] 2 CLJ 595. *Chunbidya & Ors v. Emperor* AIR [1935] PC 35 & 36.

(13) In an appeal on sentence from the subordinate courts, the High Court will not interfere with the sentence imposed, even should it be felt that a higher or lower sentence would be more appropriate, unless it can be shown to its satisfaction that in the circumstances of the particular case the sentence was manifestly excessive or inadequate or that in fixing the sentence the subordinate court had failed to adequately consider all relevant factors either for or against the offender. See *Joginder Singh v. PP* [1984] 2 MLJ 133. *Leong Ka Kong v. PP* [1976] 2 MLJ 21 and *PP v. Ng Chong Wan (supra).*

(14) The question is often raised in the sentencer's mind as to the period of imprisonment to impose in the event that the accused makes default in payment of the fine ordered. In my view, such a period ought, within the confines expressly mandated in s. 283 of the Criminal Procedure Code, to be co-extensive or at least reasonably co-relative with the income that the accused would have earned in his then current occupation had he not opted to remain in prison. And, should the accused be unemployed, then the amount payable in default may be whatever amount that is reasonable and not too onerous considering his qualifications or social status or standing in life. It is thus material for the sentencer to discover and make a record of the accused's income or his standing in life. See *Goh Keng Seong v. PP (supra)* and *Mohd Johan Mutalib v. PP* [1978] 1 MLJ 213.

The facts and circumstances of the case carefully gleaned from the Appeal Record and the submissions of counsel and the learned Deputy Public Prosecutor throw into sharp focus the deterrent factor among the several considerations encompassed under principles or sentencing discussed above in the welter of case authorities. See *PP v. Ng Chong Wan (supra).*

What we have here is a case where, within the period of less than three months from 23 January 1999 to 12 April 1999 there were four separate but similar snake-cases in Magistrate's Court calendar for offences committed at regular intervals, that is, on 23 January 1999, 2 February 1999, 8 February 1999 and 12 April 1999. In every single one of all the offences, persons of various identities accused of illegal possession of snakes had pleaded guilty, and quietly paid the fine of RM3,000 to RM4,000 for each offence. Notably, there was never any appeal against the maximum or near maximum fine. Immediately after the disposal of each case, the snake exhibits were then

ordered to be sent to the Wild Life Protection Department. But, due to the inability of the said Department to maintain the very large number of wild snakes they had to be promptly auctioned-off. And, the Appeal Record (pp 23 and 24) discloses that such public auctions of snakes have consistently found ready bidders among certain characters, though – I must hasten to add – not the accused persons. This peculiar sequence of arrest, conviction and bidding soon assume a sinister pattern to the alert magistrate.

It then dawned upon the learned magistrate who, incidentally, had presided over all the previous four similar snake-cases, that snakes of the species concerned fetch considerably higher prices in the overseas esoteric market of gourmet patrons than auction prices, and the courts may have been unwittingly used to regularise or legitimise the illegal possession for smuggling of protected snakes. To put it bluntly there appeared to be a cunning conspiracy for monetary gain through cynical instrumentation of the court of law by certain parties. According to the learned magistrate, in his grounds of judgment (p. 19 of the Record) the 2546 snakes could fetch an estimated RM80,000 in the esoteric market, which works out to an average of RM31.42 per snake. Whereas it appears from the receipts exhibited in p. 24 of the Appeal Record, that certain bidders at the auction conducted by the Wild Life Protection Department paid only around RM4 per snake. Thus, even taking into consideration the total fines of RM11,000 paid in the current case, it does not call for any mathematical prowess to figure out that the net profit on 2546 snakes could be not less than RM58,816. Such cool amount of illicit profit obviously attracts hot penalty. Hence, in the current case, bearing in mind the unusually short recurrence span, and the prevalence in Perlis of illegal possession of huge quantity of snakes (obviously for smuggling purposes) and in order to deter such offences, the learned magistrate Tuan Azizan Md Arshad had, quite rightly and wholly acting within his powers, found it necessary to take judicial notice of the considerably higher prices than auction prices that such snakes fetch in foreign esoteric market, and was driven to impose a short term of imprisonment besides the maximum fine he had normally imposed in the previous cases. He was convinced he had little choice, as the maximum fines he had imposed in earlier cases did not seem to have the slightest effect (see *Lee Yong Wu v. PP* [1965] 28 MLJ 351), and decided that a fine alone could never be a deterrent sentence in a case of this nature (see *Lasoo & Anor v. PP* [1965] (1) 31 MLJ 235). Quite apparently, that penalty of incarceration was the singular factor that may have thrown certain sinister operators out of their lucrative rhythm of operation, and hence this appeal. Incidentally, it is of interest to note that since the date of commission of this offence on 12 April 1999 until now, no such snake-offences have been recorded in Perlis, and all is quiet on the Nothern Front – so to say.

In dispensing justice magistrates should not be oblivious of the feel of temperature outside their courts and continue to adopt the same approach in sentencing while (as here) there in laughter in the air outside by certain characters on their way to the bank. Counsel for the applicant had submitted that as the accused was a first offender, the learned magistrate ought not have imposed a term of imprisonment. This may be quite so, in fact patterns of normal case. Indeed, I could't have agreed more with this approach when. In *Goh Keng Seong v. PP (supra)*, I had occasion to say, "In short, there should be sufficient culpability on the part of the accused to justify imprisonment. This ought to be so as the court has to bear in mind that sending a motorist to prison, especially for a substantial term, would entail his having to commune and react with character of an entirely different ken and may thus emerge from prison metamorphosed into a personality, the worse for society. Here, I am mindful of Professor TTB Koh's stimulating speech on a plea for penal reform which he delivered to the Kiwanis Club Singapore on 18 April 1972, wherein he expressed his concern about the probable 'corrupting influence of the inmate sub-culture', and which is reproduced in [1972] 1 MLJ lvii. This itself is inimical to public interest." However, just as the contention that the provision for minimum mandatory imprisonment in a non-capital case is anathema to criminal jurisprudence, so also, we must be mindful that there is no law which precludes the magistrate, in a given peculiar set of circumstances, from imposing a term of imprisonment even for first-time offender. Thus, when sentencing in certain exceptional cases, the court may factor into its deliberations on the question of public interest, not only patent but also latent circumstances that may operate for or against the accused person.

Certainly, given the above fact matrix, even the appellant's counsel would concede that the learned magistrate had consciously carried out a carefully considered and calculated exercise of his discretion to mete out, what was to him, a condign penalty while constrained by the then prevailing circumstances, with the sole objective of deterring humdrum recurrence of such offences.

Thus, this court is entirely satisfied that the sentence of fine coupled with imprisonment imposed by the learned magistrate was not manifestly excessive under the circumstances of the case and he had adequately taken into consideration – certainly, mulled over – all the relevant factors necessary to maintain an equitable balance between prosecution and the offender. Quite obviously, the prevalence-of-offence factor had indeed tipped the scales in favour of a custodial penalty. I therefore dismissed the appeal after applying the above guidelines to the present case.

However, confronted with the unfortunate fact disclosed in the appeal record that about 1893 snakes had died while awalting disposal resulting in undue hassle on the authorities (as pointed out by the learned deputy), and considering that the maximum term of imprisonment allowed under the relevant sections is three years, I then called upon the defence to show cause why this court should not exercise its powers of revision under s. 325 of the Criminal Procedure Code to enhance the term of imprisonment. And, after having heard counsel, I decided that as a forewarning to characters of the appellant's ilk, this was a proper case to invoke s. 325 to increase the respective seven days period of imprisonment to 14 days on each of the three charges, all to be served by the appellant concurrently. And it was so ordered.